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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

VITAMINS ONLINE, INC., a Delaware corporation,

Plaintiff,

v.

HEARTWISE, INC. an Oregon corporation d/b/a NATUREWISE,

Defendant.

VITAMINS ONLINE'S MOTION FOR ADMISSION OF EXHIBIT 571

Case No.: 2:13-cv-00982-DAK

Honorable Dale A. Kimball

Honorable Jared C. Bennett

Plaintiff Vitamins Online, Inc., ("Vitamins Online") through its counsel of record

MAGLEBY CATAXINOS & GREENWOOD, PC, hereby moves for the admission of Exhibit No. 571.

The Court should admit Exhibit No. 571 because there can be no genuine dispute as to its authenticity for no less than four reasons.

First, on July 30, 2020, Defendant HeartWise, Inc., d/b/a NatureWise ("NatureWise") stipulated to the admissibility of each of the Exhibits discussed by Ms. Tammy Malley-Naslund, the 30(b)(6) witness for Amazon, during her January 26, 2018 deposition, save for one—a spreadsheet produced by Amazon reflecting reviews that were suppressed from NatureWise's product pages on Amazon.com. [Amazon Reviews, Plaintiff's Exhibit No. 571]. However, the exhibit was authenticated during Ms. Malley-Naslund's deposition in the following portion of the deposition designated by Vitamins Online:

17	Q. (By Mr. Nydegger) Do you have that?
18	A. I do.
19	Q. Thank you. Is this spreadsheet -- this is a
20	printout of an Excel spreadsheet, correct?
21	A. Yes.
22	Q. And that spreadsheet was produced by Amazon in
23	response to a subpoena in this case, correct?
24	A. That is correct.
25	Q. And does the spreadsheet in Exhibit 11 reflect

1	documents and information that Amazon keeps in the course
2	of its ordinary business?
3	A. It does.
4	Q. And is there any reason for you to believe that
5	any information on this -- in this spreadsheet is not
6	genuine or authentic?
7	MR. INGRAM: Objection: Lacks foundation, calls
8	for speculation.
9	A. Excuse me. No, there's no reason to believe
10	that -- for me to believe that any of this is not genuine.
11	Q. (By Mr. Nydegger) Okay. Thank you.

[1-26-2018 Dep. Tr. Malley-Naslund Designations 81:17-82:11, designations attached as Exhibit “3” to Reply to NatureWise’s Objection to Vitamins Online’s Designation of Deposition Excerpts for Use at Trial, Dkt. No. 492 (yellow highlighting reflects Plaintiff’s designations; blue highlighting reflects Defendant’s designations)]

Second, although NatureWise now objects to the admission of the damaging document, NatureWise designated seven pages of questioning by prior counsel on the subject of the document in Ms. Malley-Naslund’s deposition, including an acknowledgment by prior counsel that the document “was produced by Amazon.”

15	Q. (By Mr. Ingram) Ms. Naslund, before we went off
16	the record I was asking you some specific questions about
17	reviews on Exhibit 11. I'm going to now ask you some
18	questions about just all of them in general, okay?
19	A. Okay. Yes.

[*Id.* 48:13-16, 48, 49, 54-57, Ex. 3 to Dkt No. 492].¹

Third, Amazon provided a declaration from its custodian of records on August 13, 2015, stating that:

6. All data and information produced by Amazon are business records in that they are: (1) records kept in the ordinary course of business; (2) created at or near the time of the transactions or events reflected therein by, or based on information from, a person with knowledge of the transaction or events; and (3) kept as part of a regular business activity.

¹ Exhibit No. 11 to Ms. Malley-Naslund’s deposition is a printed copy of the native Excel spreadsheet identified as Plaintiff’s Exhibit No. 571.

[August 13, 2015 Amazon.com, Inc.'s Custodian of Records Declaration, enclosed in December 12, 2016 Letter C. Nydeggar to B. Johnson, attached as Exhibit "A"].

Fourth, in a December 12, 2016 letter between counsel for the parties, Vitamins Online's prior counsel conveyed the declaration from the Custodian of Records, stating that the "declaration . . . authenticates the documents already produced to you from Amazon" and asking that "in the event you perceive that NatureWise has been prejudiced by [the] delay [in conveying the declaration, [Vitamins Online is] willing to stipulate to [NatureWise] deposing Amazon's Custodian of Records." [December 12, 2016 Letter C. Nydeggar to B. Johnson, Ex. A].

For the foregoing reasons, the Court should grant this motion and admit Exhibit No. 571.

DATED this 31st Day of July, 2020.

MAGLEBY CATAKINOS & GREENWOOD, PC

/s/ Geoffrey K. Biehn

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CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY CATAKINOS & GREENWOOD, PC, 170 South Main Street, Suite 1100, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), Federal Rules of Civil Procedure, a true and correct copy of the foregoing **VITAMINS ONLINE'S MOTION FOR ADMISSION OF EXHIBIT NO. 571** was delivered to the following this 31st day of July, 2020, by:

- Hand Delivery
- Depositing the same in the U.S. Mail, postage prepaid
- Electronic Mail
- CM/ECF System

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